United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

original

DOCKET NO. 74 - 1411

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.
ROBERT McCOY,

Petitioner-Appellant,

-against-

J. EDWIN LaVALLEE, Superintendent
Clinton Correctional Facility,
Dannemora, New York,

Respondent-Appellee.

On Appeal from the United States District Court

for the Southern District of New York

BRIEF AND APPENDIX FOR PETITIONER-APPELLANT

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BRIEF FOR PETITIONER-APPELLANT

Robert McCoy appeals in forma pauperis from an Order entered in the United States District Court for the Southern District of New York on February 27, 1974, denying without a

hearing his petition for a writ of habeas corpus to review the constitutionality of a judgment of conviction entered by the Supreme Court of the State of New York, New York County.

STATEMENT

A. Background of the Case

On January 22, 1968, McCoy was convicted of murder in the first degree and attempted murder in the first degree following a trial before a jury. On April 16, 1968, he was sentenced by the same court, Hon. Charles G. Tierney, JSC, to a term of life imprisonment for first degree murder and a concurrent term of 12-1/2 to 25 years for attempted murder.

The judgment of conviction was affirmed without opinion by the Appellate Division of the New York Supreme Court, First Department, on September 16, 1969. People v. McCoy, 33 A.D.2d 533, 303 N.Y.S.2d 630 (1st Dept. 1969). On December 10, 1970 the conviction was affirmed by the New York Court of Appeals. People v. McCoy, 27 N.Y.2d 990, 318 N.Y.S.2d 745, 267 N.E. 2d 481 (1970).

On November 14, 1972, McCoy acting pro se, filed his present petition for a writ of habeas corpus in the court below. McCoy stated that his conviction violated his right of due process under the Fourteenth Amendment to the U.S. Constitution in that evidence of an impermissibly suggestive

"showup" identification was admitted at his state court trial, together with an in-court identification tainted by the prior out-of-court identification. McCoy also complained that the trial court's refusal to allow him to submit voluntarily to a polygraph test while he was held in custody denied him the effective assistance of counsel and his constitutional right to equal protection of the laws. Finally, McCoy asserted that the trial court's refusal to give a preliminary ruling on the admissibility of his criminal record denied him the effective assistance of counsel and due process of law guaranteed to him by the United States Constitution. This is petitioner's first request for such relief.

The District Court below, the Hon. Robert J. Ward, did not hold a hearing but, upon examination of the state court record and relying upon the trial judge's findings, held that it was not error to permit the in-court identification or to allow testimony concerning the police station showup. (A-9)* The District Court also held that McCoy's claims relating to the taking of a polygraph test and the requested preliminary ruling on the use of his prior convictions for impeachment purposes were "matters of evidence which are not of Constitutional dimension." (Ibid). Accordingly the District Court dismissed

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* The reference "A-" is to the Appendix on Appeal which contains the complete record of the proceedings in the District Court, including the court's Memorandum Opinion, at pages A-1-9.

the petition, but granted a certificate of probable cause.

B. Statement of Facts

The crimes for which petitioner McCoy was convicted were the murder of Malachi Jackson and the attempted murder of Lonnie Chambliss in the early morning hours of May 28, 1966. The principal witness for the prosecution was the victim, Chambliss, who at trial, identified Robert McCoy as the man whom he and Jackson met on a street corner while returning from an evening at various "gay" bars on the upper west side of Manhattan, and who was introduced to Chambliss by Jackson as "a friend of mine by the name of Johnny." (339).* Chambliss testified that "Johnny" returned with them to Jackson's apartment where, after a few drinks, "Johnny" drew a gun and a knife, ordered them to undress, tied them up, and proceeded to beat, sexually abuse, and finally slash Jackson's throat.** Before leaving, "Johnny" also slashed Chambliss' throat, but the wound was not fatal and Chambliss

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* Numbers in parenthesis, unless otherwise indicated, refer to the pages of the trial transcript.

** The only corroborative evidence offered by the prosecution was a purported confession testified to by McCoy's former cellmate, Eugene Griffin, a convicted felon awaiting sentencing. (230-31). Griffin's story was thoroughly impeached by testimony of another cellmate and a corrections officer who established that Griffin had a grudge against McCoy and a motive to lie. (753-54).

was able to get up, open the door and run out into the street where he was picked up by a passing patrol car, taken to a hospital, treated and released.

Sometime later the same day, Chambliss was questioned by the police and described his attacker as a man about 27 or 28 years old, weighing about 140 to 150 pounds, dark-skinned, well-educated and well-spoken. (377-80). A few days later Chambliss gave the same description to a police artist who made a composite sketch of the suspect. Neither the description nor the sketch noted that the assailant had any particular scars or other unusual facial characteristics (360), although McCoy has prominant scars on his face and a nose which is so disfigured and discolored that Chambliss could later see these distinctive features at a distance of twenty feet. (386-88).

Some six weeks later, on July 10, 1966, Chambliss was summoned to the police station house and asked, together with another witness, to observe through a one-way mirror a suspect who had been placed under arrest. (397).* The suspect, McCoy, was alone while Chambliss and the other witness observed him for a period of about ten minutes with one interruption during which the police made McCoy stand and turn around so Chambliss could get a better view. (398, 402-07). Finally,

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* A police identification procedure where the suspect alone is presented to the eye witness for a "yes" or "no" identification is referred to as a "showup."

at the end of the ten minutes, Chambliss identified McCoy as the "Johnny" who had attacked him and Jackson on May 28, 1966.

During the trial, but out of the presence of the jury, the trial judge held a Wade-Gilbert* hearing to determine the admissibility, in light of the prior station house showup identification, of Chambliss' anticipated in-court identification of McCoy. The purpose of this hearing was, ostensibly, to determine whether the witness' in-court identification had been tainted by the unduly suggestive and unnecessary out-of-court showup procedure or whether it was based upon an independent recollection.

Following the Wade-Gilbert hearing, the trial judge found, on the basis of the evidence before him, that Chambliss had ample opportunity to observe the person who was with him and the deceased in Jackson's room on May 28, 1966, and that the expected in-court identification was not based upon the illegal showup identification held on July 10, 1966. (436-37). On the basis of these findings, the judge held that Chambliss was qualified to make an in-court identification of McCoy as that person. Subsequently, Chambliss was allowed to identify McCoy to the jury (447), and was even allowed to testify briefly

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* United States v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S. 263 (1967).

about the illegal confrontation at the police station. (488-89).

In holding that the identification procedures did not violate petitioner's right to due process of law, the court below relied upon the trial judge's findings with regard to the admissibility of the showup and the in-court identifications. However, these findings were based only upon the facts adduced at the hearings. An examination of the entire transcript of the trial reveals that the prosecution managed to keep from the trial judge's consideration several very important facts. Specifically, the trial Judge was not advised by the prosecution that the witness had had an operation on his left eye only a month before the incident (499), that at the time of the incident his vision in that eye was sharply impaired (516, 539, 584), and that, at the time of the trial, the witness was, in fact, totally blind in his left eye. (511, 584).* These factors, of course, had a direct bearing on the question of the witness' ability to make a reliable identification. Without this significant information, the trial judge's ruling that the in-court

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* The evidence of the witness' impaired vision was brought out on cross-examination before the jury when, after his direct testimony, copies of his prior statements and testimony were provided by the prosecution to the defense pursuant to People v. Rosario, 9 N.Y.2d 286, 213 N.Y.S.2d 448, 173 N.E. 2d 881 (1961).

identification testimony would be admissible was not based upon an evaluation of all the relevant evidence and it was error for the court below to rely upon this finding to conclude that the petitioner's constitutional rights had not been violated.

Petitioner-appellant also submits that the District Court erred in refusing to consider his claims of two additional violations of his constitutional rights:

First, several months prior to the trial, McCoy's assigned counsel requested that he be permitted to take a polygraph test. Permission was necessary because McCoy could not meet bail and was being held in custody pending trial. When an informal request was denied, a motion was made claiming that the test was necessary for the preparation of the defense. This motion was denied and a similar motion to the Appellate Division was dismissed. (17-18). A final request at trial was also denied. (19). To the extent McCoy was deprived of an opportunity he would have had available to him had he been free on bail, he was deprived of the effective assistance of counsel and the equal protection of the laws.

Finally, at the outset of the trial defense counsel requested that the court make a preliminary determination as to which of McCoy's prior convictions, if any, could be used for impeachment purposes should he decide to testify in his own

defense. Such a preliminary determination was necessary to guide defense counsel in properly advising their client on the important question of whether to take the stand in his own defense. The court below found no error in the denial of this request.

C. Questions Presented

1. Whether, under the totality of the circumstances, the pretrial showup identification in the present case was so impermissibly suggestive as to make a subsequent in-court identification inadmissible as a matter of law.

2. Whether a defendant held in custody pending trial is denied the effective assistance of counsel and the equal protection of the laws when he is denied permission to submit to a polygraph examination?

3. Whether a defendant is denied due process of law and the effective assistance of counsel, when the trial judge refuses to make a preliminary ruling on the admissibility, for impeachment purposes, of defendant's prior convictions?

D. Constitutional Provisions Involved.

The Sixth Amendment to the Constitution of the United States provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the Constitution of the United States provides in part:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ARGUMENT

I

THE SHOWUP PROCEDURE AT WHICH McCOY WAS IDENTIFIED WAS IMPROPER AND THE ADMISSION OF TESTIMONY OF THE SHOWUP IDENTIFICATION TOGETHER WITH AN IN-COURT IDENTIFICATION TAINTED BY THE SHOWUP VIOLATED HIS RIGHT TO DUE PROCESS OF LAW

Six weeks after the crimes in this case were committed, the witness Chambliss was brought to the police station and asked, together with another witness,* to view McCoy who was sitting alone in a small room, through a one-way glass, while police officers made McCoy stand up, turn around, and walk closer to the glass. (395-407). A classic police showup, such as the one to which McCoy was subject, has consistently been criticized because of the increased likelihood of misidentification through the suggestion that the person in custody is the guilty party. The Supreme Court in United States v. Wade, 338 U.S. 218, 234 (1967), said "[i]t is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented [in the showup] is believed guilty by the police." As Justice Douglas, in his dissenting

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* It has been noted that observation with another eye-witness suggests the guilty of the suspect at the time of the confrontation. See Clemons v. United States, 408 F.2d 1230, 1245 n. 16 (D.C. Cir. 1968), cert. denied, 394 U.S. 964 (1969).

opinion in Biggers v. Tennessee, 390 U.S. 404, 407 (1968), aptly put it, "[t]he message [of the showup] is clear: the police suspect this man. That carries a powerful suggestive thought." (emphasis is original). See also WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 28 (1965).

The showup conducted in the present case was clearly suggestive and totally unjustified under the circumstances. Nevertheless, the trial court allowed the jury to hear testimony of the illegal confrontation and, further, permitted an in-court identification to be made despite its being tainted by the prior, unduly suggestive showup. These actions resulted in a violation of McCoy's constitutional right of due process.

A. The showup identification, unjustified by any urgency, was unnecessarily suggestive and should have been excluded from evidence.

The parties at the trial seemed to recognize that the showup identification violated the defendant's right of due process and that testimony of it was inadmissible.* The one-man showup at which Chambliss first identified McCoy, was unnecessarily suggestive and unjustified by any exigent circumstances. The confrontation took place six weeks after the incident and was not a prompt on-the-scene identification

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* Indeed the only issue at the Wade-Gilbert hearing, and the one upon which the trial judge expressly ruled, was the admissibility of an identification of the defendant in open court. (436-37).

which might be justified as necessary on the theory that the image is still fresh in the witness' mind. See Bates v. United States, 405 F.2d 1104 (D.C. Cir. 1968); Caruso v. United States, 406 F.2d 558 (2d Cir.), cert.denied, 396 U.S. 868 (1969). After six weeks, the few hours delay necessary to arrange a fair lineup would not have had any substantial effect on the freshness of Chambliss' memory. There was no urgency at all in the present case. The witness was neither critically ill, nor wounded and in danger of dying before proper lineup procedures could be set up. Stovall v. Denno, 388 U.S. 293 (1967).

Nevertheless, the court below concluded that the trial judge "implicitly found" the showup procedure not so impermissibly suggestive as to preclude the admission of testimony concerning it at trial. The basis for that conclusion was merely that he "allowed such testimony even after counsel for petitioner strenuously argued that Stovall, supra, should prevent it." (A-8).

Even if the District Court is correct that the trial judge made a finding on this issue, this "implicit finding" is completely unsupported by the record, which contains no reference to any urgency or other consideration which would justify use of the unduly suggestive showup procedure. The prosecutor did elicit, over defense counsel's objection, the

following testimony of the illegal pretrial confrontation on direct examination of the witness Chambliss:

> Q. After the night this happened, May 24th [sic] of 1966, did there come a time when you again saw the defendant?
>
> A. Yes.
>
> Q. And was that at the station house?
>
> A. Yes, it was.
>
> MR. WALL: [defense counsel]: Your Honor, I am going to object to this on the grounds already stated.
>
> THE COURT: I will allow it at this time.
>
> MR. WALL: Exception.
>
> THE COURT: You are asking him if he saw the defendant later on, after this night that he was on the corner and the police brought him to St. Luke's Hospital, - -
>
> MR. LANKLER [prosecutor]: That's right.
>
> THE COURT: -- and then he went back to Malachi's apartment with the police that same morning. Is that right?
>
> MR. LANKLER: Yes.
>
> THE COURT: May 28th. Now you are directing his attention to the next time he saw the defendant. Is that right?
>
> MR. LANKLER: That's what I am asking. And I believe he testified that the next time he saw the defendant was at the station house.
>
> THE COURT: All right. When was that?

Q. When was that? Do you know the date?

A. I don't know the exact date.

Q. Was it some time afterwards, a month after, a month and a half afterwards?

A. It was some time in July. (488-89).

Although the testimony of the illegal confrontation proceeded no further than this, the reference to the "station house," particularly as emphasized by the trial judge, could only indicate to the jury that Chambliss had previously identified the defendant. As the Supreme Court in Gilbert v. California, 388 U.S. 263, 273-74 (1967), observed:

> ". . . the witness' testimony of his lineup identification will enhance the impact of his in-court identification on the jury and seriously aggravate whatever derogation exists of the accused's right to a fair trial."

This observation is particularly apt in the circumstance of the present case where the witness testified that he was completely blind in one eye at the time of trial (511, 584),* but had at least limited vision at the time of the initial identification. Doubts the jury must have had regarding the reliability of the in-court identification were

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* The extent of the impairment of the witness' perception by the time of the trial is illustrated by the fact that he estimated that the defendant was sitting about nine feet from the witness stand when, in fact, the distance was approximately twenty feet. (385).

surely lessened by the inference from the testimony that Chambliss had previously identified the defendant. The admission of this testimony in a trial conducted after the Supreme Court's decision in Stovall v. Denno, supra, is by itself, sufficient ground for overturning the conviction. See, Neil v. Biggers, 409 U.S. 188, 198 n.5 (1972); Clemons v. United States, 408 F.2d 1230, 1248 (D.C. Cir. 1968), cert. denied, 394 U.S. 964 (1969).

B. Under the totality of the circumstances, the witness' in-court identification was tainted by the prior showup confrontation and was so unreliable as to be constitutionally inadmissible as a matter of law.

Following the procedure prescribed in People v. Ballott, 20 N.Y.2d 600, 607, 286 N.Y.S.2d 1, 7, 233 N.E.2d 103, 107 (1967), and approved by this Court in United States ex rel. Phipps v. Follette, 428 F.2d 912, 913 n.1 (2d Cir.) cert. denied, 400 U.S. 908 (1970), the trial judge held a hearing, out of the presence of the jury, to determine whether the profferred in-court identification of the defendant by Chambliss had been tainted by his prior identification at the illegal showup. The court below accorded great weight to the findings of the trial court following this hearing in determining that the in-court identification did not violate McCoy's right to due process. (A-8). Petitioner-appellant submits that the hearing at which the court decided that the in-court identification was not so tainted, was rendered a nullity by the prosecution's withholding from the court significant information concerning the witness' capacity to make an eyewitness identification. Specifically, the court was not advised that Chambliss had had an operation on one eye just prior to the date of the crimes, that his vision was impaired in that eye on the date of the crimes, and that he had completely lost

the vision in the eye by the time of trial. (511, 584). Where a Wade-Gilbert hearing does not elicit important information bearing on the issue of reliability of the identification, the findings of the trial court are not entitled to special consideration. La Vallee v. Delle Rose, 410 U.S. 690, 695 (1973); United States ex rel. Cannon v. Montanye, 486 F.2d 263, 267-68 (2d Cir. 1973).

The purpose of a Wade-Gilbert hearing is "to determine whether, before the imprint arising from the unlawful identification procedure, there was already such a definite image in the witness' mind that he is able to rely on it at trial without much, if any, assistance from its successor." United States ex rel. Phipps v. Follette, supra, 428 F.2d at 915. See also United States ex rel. Gonzalez v. Zelker, 477 F.2d 797, 801 (2d Cir.), cert. denied, 414 U.S. 924 (1973); Clemons v. United States, supra, 408 F.2d at 1237. Courts and legal theorists may disagree as to how this difficult determination should be made, United States v. Wade, 388 U.S. 218, 248 (1967)(Black, J., dissenting), but no one will deny that resolution of the issue "depends on the totality of the circumstances." Stovall v. Denno, supra, 388 U.S. at 302. See United States ex rel. Phipps v. Follette, supra, 428 F.2d at 915. In reviewing the

"totality of the circumstances," the trial and appellate courts are actually making a ruling on the reliability of the in-court identification and, therefore, must consider such factors as the opportunity and motive of the witness for careful observation, the witness' degree of attention, the accuracy of the witness' prior descriptions of the criminal, and the degree of suggestiveness of the initial confrontation. Neil v. Biggers, 409 U.S. 188, 199 (1972); United States ex rel. Phipps v. Follette, supra, 428 F.2d at 915; United States ex rel. John v. Casscles, 489 F.2d 20, 23-24 (2d Cir. 1973). Applying these factors to the present case leads to the inescapable conclusion that there was a very substantial likelihood of misidentification by the witness.*

A very significant part of the "totality of the circumstances" in the present case was the fact of the witness' impaired vision. The sufficiency of a person's vision has a direct bearing on his opportunity for observation,which is one of the important factors for a court

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* The only factor in favor of the reliability of the identification is the positiveness of the witness, but this is a factor "to be weighed warily and in the relization that the most assertive witness is not invariably the most reliable." Clemons v. United States, supra, 408 F.2d at 1242.

to consider in determining whether the witness' identification is reliable, independent of any possible taint from the illegal pretrial identification. See Clemons v. United States, supra, 408 F.2d at 1248; United States ex rel. Phipps v. Follette, supra, 428 F.2d at 915. A careful re-examination of the evidence adduced at the Wade-Gilbert hearing at McCoy's trial shows how significant the information withheld by the prosecution was and how it led to an incorrect determination as to the reliability of the witness' identification.

Chambliss testified that he was introduced to "Johnny" by Jackson at approximately 2:30 A.M. on a rainy* morning on a street corner a few blocks from his apartment. (339, 361). They spoke only a few words before walking to Chambliss' and Jackson's apartment building. Jackson walked between Chambliss and "Johnny" and Chambliss stated that he was not paying any particular attention to "Johnny" at the time. (370).

Upon reaching the apartment building the three men entered a small elevator about 3-1/2 feet wide and 5 to 2-1/2 feet long, which had a light in it. (346). Once in Jackson's

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* Chambliss testified "it was drizzly raining" (554), whereas Patrolman Schiele had already testified that at 4:45 A.M. "it was raining very hard." (196).

room, Chambliss testified that "Johnny" sat approximately 6-1/2 or 7 feet from him while Jackson mixed drinks for both of them. (348). For a period of about fifteen minutes Chambliss sat there drinking while Jackson and "Johnny" talked. (349). Throughout this fifteen minute period, Chambliss nursed one (371), and perhaps two drinks (454), and smoked "half a stick" of marijuana. (391).

Chambliss testified that then he left the room to take his umbrella and coat down to his own apartment. (349-50). Upon returning to Jackson's room, approximately three minutes later, he found Jackson alone. (350). Shortly thereafter, he heard the hall bathroom flush and saw "Johnny", who was then wearing a pair of glasses, return to the room, draw a gun and say "This is a holdup." (356, 375). "Johnny" then ordered both men to undress and get on the bed, which they did. (357).* Chambliss testified that while he and Jackson were on the bed, "Johnny" got on the bed, on top of

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* Significantly, Chambliss did not testify at the hearing, as he did on direct examination during the trial, that "Johnny" also ordered both he and Jackson to drink a "big glass of Seagram's whiskey" and swallow two sleeping pills. (463). Thus, the trial court was not made aware of an additional circumstance which clearly had a direct bearing on the witness' ability to carefully observe.

Jackson, right next to Chambliss, (358). During the next few minutes, Chambliss was only inches away from "Johnny" while "Johnny" beat, abused, and eventually killed Jackson and finally slashed Chambliss' own throat.* During this period, Chambliss testified, he was "scared to death." (431). He did not mention, however, that during the entire time he was on the bed, he was lying on his stomach, looking toward the wall, with the right side of his face against a pillow. (471, 575-84). More important, he did not testify at the hearing that his only opportunity to observe "Johnny" during this time was by glancing over his shoulder with his left eye which was then in a deteriorating condition and which subsequently became completely blind. (579-84).

Even if his vision were perfect, Chambliss' opportunity and motivation to observe would have been limited under the circumstances described. Had the fact that his vision was impaired been brought out at the hearing, however, additional testimony may have been elicited, compelling a finding that Chambliss did not have sufficient opportunity to observe "Johnny" to form an independent basis for an in-court identification. For example, the trial judge may have

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* "The impediments to an objective observation are increased when the victim is the witness." United States v. Wade, 388 U.S. 218, 230 (1967).

felt that the elevator ride provided Chambliss with an opportunity for careful observation but, because Chambliss had impaired vision in one eye, the relative positions of the three men as they rode the elevator became crucial. Questions about their relative positions were never asked, however, because the prosecution failed to point out that the witness' vision was impaired. Thus, the determination of Chambliss' opportunity to observe during this period is left to sheer speculation.

The fact that Chambliss had had an operation on his eye only shortly before the incident might also have been significant, particularly as he was not paying particular attention to "Johnny" during most of the period prior to the assault. With such knowledge, the defense might have pursued the question of whether the eye recently operated on was becoming weary in the early morning hours and under the influence of drugs and drink.

Without having the information about the adequacy of the witness' vision, the trial court's ruling at the close of the Wade-Gilbert hearing could not possibly have been based upon the "totality of the circumstance." An impairment of vision in one eye, particularly where that eye was the only one through which the witness could see during the period

when he may have had greatest opportunity and motive to observe, has such a crucial bearing on this issue that the trial court's findings can truthfully be said to have been based only upon the bare minimum of the circumstances. Thus, the reliance upon these findings by the court below was clearly unjustified.

Chambliss' impaired vision also had a direct bearing on the question of the accuracy of the witness' prior description of the criminal, another of the important factors a court must consider in determining whether, under the "totality of the circumstances," the in-court identification was reliable even though the prior confrontation procedure was suggestive. Neil v. Biggers, supra, 409 U.S. at 199; United States v. Wade, supra, 388 U.S. at 241. In the present case the discrepancies between the original description Chambliss gave to the police and the obvious characteristics of the defendant, McCoy, are so gross as to compel the conclusion that either Chambliss' vision at the time of the crime was so impaired that any identification would be per se unreliable or that he, in fact, identified the wrong man.

In his description given to the police a few hours after the crimes (377-80) and in his description to the

police artist a few days later (383-85), Chambliss made no mention whatsoever of any facial scars, disfigurement or discoloration that "Johnny" might have had. (360). However, as Chambliss himself conceded at trial, McCoy had prominant scars on his face and a nose that looks as if it has been crushed or disfigured. In addition, a portion of his nose is a different color then the rest of his face. These are all features which are distinctive and which Chambliss could clearly see, even out of only one eye, at a distance of twenty feet in the court room. (386).

Q. Now, would you take a look at the defendant again, please? Mr. McCoy? Do you notice anything about Mr. McCoy's nose from where you sit?

A. Yes.

Q. What do you notice about it?

A. It looked like his nose has been crushed, I mean -- (indicating)

Q. What is the word you used?

A. Like the nose has been disfigured.

Q. Disfigured. Would you say that as you sit there now you can notice that the defendant's nose or one portion of it, the left side of it, is also discolored, a different color than the rest of the nose?

MR. WALL: Move your head a little bit to the right, Mr. McCoy?

A. Yes, I do. (387-88).

* * *

Q. You can see all of those three items that I have just mentioned as you sit here now and look at McCoy, can't you?

A. Yes, I can.

Q. The scars? The disfigurement?

A. Yes.

Q. The discoloration?

A. Yes, I can. (408).

For Chambliss' original description to omit such obvious and important physical characteristics of the person he later identified as his assailant, is an obvious sign of unrealiability of the identification. As the leading authority on eye-witness identification put it: "A description of Cyrano de Bergerac which made no reference to a prominent nose would be somewhat suspect, as would be one of Cyclops which ignored the single eye." WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 100 (1965). Even the most casual observer of Mr. McCoy would have to agree that a description which did not mention his scars and the discoloration of his nose was clearly suspect.

The descrepancy between McCoy's actual features and Chambliss' description to the police bears much closer

examination than given by the court below* because it confirms that Chambliss' in-court identification was actually tainted by the impermissibly suggestive showup at the police station. It was at the station house showup, in fact, that Chambliss first noticed the scars. Under direct examination by the prosecution, Chambliss gave the following testimony:

> Q. At any time when giving any descriptions of this defendant did you mention any scars?
>
> A. No, I did not.
>
> Q. Did you notice any scars when you saw him in Malachi's apartment?
>
> A. No, I did not.
>
> Q. Did you notice any scars at the time you saw him at the station house when he was arrested?
>
> A. Yes, I did.

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* The District Court below discounted the very obvious differences between McCoy's features and the description given by Chambliss by noting that: "Chambliss had given the police a description which enabled them to make a composite sketch and to pick up petitioner". (A-8-9). Such a statement is completely unsupported by the record in this case. Nowhere in the entire two volume transcript of the trial is there any suggestion that the composite sketch or the description given by Chambliss had any bearing whatsoever on police's decision to arrest McCoy. The entire brief testimony of the arresting officer, which is reproduced the appendix infra, at A-10-14 is devoid of any mention of the sketch or the description.

Q. You saw the scars on him then?

A. Yes. (360).*

That the witness only noticed the facial disfigurations, which are clearly McCoy's most distinguishing features, for the first time at the police showup, strongly implies that his identification at trial was based, not upon his recollection of the assailant on the morning of May 28, 1966, but rather from his recollection of the man he saw at the highly suggestive showup identification some six weeks later. As Judge Timbers recently observed, "the longer the interval between the crime and the confrontation the greater the likelihood that the initial imprint will have dimmed and that the second image will play an important role in the in-court identification." United States ex rel. Bisordi v. LaVallee, 461 F.2d 1020, 1024 (2d Cir. 1972). That is precisely what occurred in the present case.

It is submitted that, under the "totality of the circumstances" outlined above, the in-court identification by the

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* On cross-examination (significantly, after an overnight recess) the witness changed his testimony on this point (407-08), but the original, spontaneous answer should be believed because it strains credulity that he did not notice, while looking intently at McCoy for a period of ten minutes as McCoy was made to stand directly in front of a window about one foot from him (406), features which he could see at a glance at a distance of twenty feet in the courtroom. (408).

witness Chambliss was so unreliable and so likely the product of an impermissibly suggestive showup confrontation that it was constitutionally inadmissible as a matter of law. Foster v. California , 392 U.S. 440 (1969). The court below erred in failing to set aside McCoy's conviction, which was based entirely upon this identification, in violation of his constitutional right to due process.

II

THE TRIAL COURT'S REFUSAL TO GRANT McCOY PERMISSION TO SUBMIT TO A POLYGRAPH EXAMINATION DENIED HIM THE EFFECTIVE ASSISTANCE OF COUNSEL AND THE EQUAL PROTECTION OF THE LAWS.

While McCoy was held in jail for a period of almost one-and-one-half years until the date of his trial, his assigned counsel made several requests to the Supreme Court and the Appellate Division for permission to have McCoy submitted to a polygraph examination. These requests were denied and leave to appeal to the New York Court of Appeals was denied. (17-18). A final request was denied by the trial judge at the outset of the trial. McCoy's counsel made these requests because they felt a polygraph examination would be helpful to the defense generally and not necessarily solely for use as evidence at the trial. (18). It is obvious that had McCoy been free on bail while awaiting trial, a

polygraph test could have been administered at any time without the consent or approval of corrections officers, the district attorney or the courts. However, because McCoy was held in custody pending trial and because his attorneys' reasonable requests were refused, he was denied the "unhampered preparation of a defense which would otherwise have been available to him." See Stack v. Boyle, 342 U.S. 1, 4 (1951). Such a result is also a clear violation of McCoy's right under the fourteenth amendment to "the equal protection of the laws."

The State may argue that the refusal to permit a polygraph test was not prejudicial to McCoy because such tests were not admissible as evidence in a criminal trial in New York at the time of his trial. See People v. Forte, 279 N.Y. 204, 18 N.E.2d 31 (1938). But such an argument ignores two very important considerations.

First, regardless of the admissibility of the examination at trial, the polygraph test, or the results thereof, might still have been helpful to McCoy's counsel in the preparation of the defense. Courts have long recognized the importance of the polygraph as an investigative tool for law enforcement agencies. See State v. Lowry, 163 Kan. 622, 628, 185 P.2d 147, 151 (1947); Henderson v. State, 94 Okal. Crim. 45, 54, 230 P.2d 495, 504, cert. denied, 342 U.S. 898 (1951). The polygraph can be equally helpful to defense counsel, and might have been useful in an appeal to

the district attorney to use his discretion and drop the charges against McCoy.

In a recent case, strikingly similar to the present case in that the prosecution's case also relied heavily on eyewitness identification of the defendant, a polygraph examination proved exceedingly helpful although it was never presented as evidence to the jury. United States v. Dioguardi, No. 72 Crim. 1102 (E.D.N.Y. Nov. 30, 1972). In this unreported case, the results of polygraph tests of both the defendant and a witness tended to show the defendant's innocence. As a result, the state agreed to dismiss the indictment. The case is discussed in Note, 48 N.Y.U.L. REV. 339, 343 (1973); and Note, 73 COLUM. L. REV. 1120, 1133 (1973). Several law enforcement agencies in California uniformly refuse to file complaints or information when no deception is shown in polygraph examinations. See People v. Cutter, 12 Crim. L. Rptr. 2133, 2134 (Cal. Super. Ct. Nov. 6, 1972). It is entirely possible that in the present case, a favorable polygraph test result, coupled with the obvious deficiencies in the eye witness identification provided by the victim Chambliss, discussed supra, would have led the prosecution to reconsider the indictment.

Second, it might have been possible to convince the trial court to receive the results of polygraph examination in evidence at trial, but because McCoy was denied permission to take such a test, his attorneys were foreclosed

from arguing that such tests are reliable and their results should be admitted as evidence. Most cases excluding such evidence trace their history to the 1923 case of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). The basis for the decision in Frye was simply that the polygraph had not yet established itself with a sufficient degree of acceptance for scientific reliability. Id. at 1014. McCoy should not have been foreclosed from arguing that advances in the state of the art in the 45 years since the Frye case have established the degree of acceptance necessary for admissible evidence. There appears to be a trend in other jurisdictions to allow evidence of polygraph examinations in proper cases. United States v. Ridling, 350 F. Supp. 90 (E.D. Mich. 1972). See also State v. Valdez, 91 Ariz. 274, 371 P.2d 894 (1962); State v. Ross, 7 Wash. App. 62, 497 P.2d 1343 (1972) (Polygraph evidence admitted by prior stipulation where there was opportunity to cross-examine the polygraph operator.)* It cannot be said that an effort to have the results of an examination of McCoy admitted into evidence would have been unsuccessful had McCoy been allowed to take the examination as requested.

Thus, it is clear that the refusal to permit McCoy to take a polygraph examination, when a criminal defendant who was free pending trial could have taken such an examination without

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* For a discussion of these and other cases approving the use of polygraph evidence, see Note, 48 N.Y.U.L. REV. 339 (1973); Note, 73 COLUM. L. REV. 1120 (1973).

permission, was a denial of equal protection under the law and was substantially prejudicial to his right to the effective assistance of counsel.

III

THE REFUSAL OF THE TRIAL JUDGE TO MAKE A PRELIMINARY RULING ON THE ADMISSIBILITY OF McCOY'S PRIOR CONVICTIONS DENIED HIM DUE PROCESS OF LAW AND THE EFFECTIVE ASSISTANCE OF COUNSEL

At the outset it should be pointed out that the District Court below appears to have misconstrued Point Three of appellant's pro se petition for a writ of habeas corpus. The court noted "[p]etitioner also claims that the trial judge erroneously denied a motion to suppress the use of prior convictions on cross-examination should petitioner have decided to take the stand," and dismissed it as a claim "pertaining to matters of evidence which are not of constitutional dimension." (A-9). In fact, petitioner-appellant's claim below was as follows:

> "Point III. The trial court committed reversible error when it denied the defendant's motion requesting the court to inspect the defendant's criminal record, if any, and determine which, if any, convictions appearing thereon could be utilized by the People on cross-examination to affect the defendant's credibility, should the defendant testify."

The motion made at trial was not one to suppress evidence, but rather a request for a preliminary determination as to what prior convictions, if any, could be used to impeach the defendant's credibility. (2-3). The

purpose of the motion was to enable defense counsel to make an informed judgment as to whether to place the defendant on the stand to testify in his own defense. (3-4). "The defendant who has a criminal record may ask the court to weigh the probative value of the convictions as to the credibility against the degree of prejudice which the revelation of his past crimes would cause; and he may ask the court to consider whether it is more important for the jury to hear his story than to know about prior convictions in relation to his credibility." Gordon v. United States, 383 F.2d 936, 939 (D.C. Cir. 1967), cert. denied, 390 U.S. 1029 (1968).

The rule requiring a trial judge to exercise his discretion to exclude evidence of prior convictions, was articulated in Luck v. United States, 348 F.2d 763, 768-69 (D.C. Cir. 1965). Although the court in Luck was interpreting a District of Columbia statute, the rule has broader implications and, in fact, appears to be the law in the Second Circuit. See United States v. Palumbo, 401 F.2d 270, 273 (2d Cir. 1968); cert. denied, 394 U.S. 947 (1969); United States v. Puco, 453 F.2d 539, 541 (2d Cir. 1971).

The rule is more than a rule of evidence, because it bears directly on the accused's constitutional

right to testify in his own defense. As was said in United States v. McCord, 420 F.2d 255, 257 (D.C. Cir. 1969):

> "While, as a matter of law, a defendant is always vouchsafed the constitutional right to testify regardless of the trial court's grant or denial of his request for immunity from impeachment by his prior criminal record, as a practical matter an adverse ruling may effectively foreclose a defendant from taking the witness stand, lest his past misdeeds be his undoing at his present trial."

Whether the defendant should testify was a particularly crucial decision in the present case where the prosecution's entire case rested upon an eye witness identification that had many deficiencies. See Barber v. United States, 392 F.2d 517, 519 (D.C. Cir. 1968). However, without the preliminary determination requested of the trial judge, the defendant could not take the witness stand and risk being tried, not on the evidence before the jury, but upon the evidence of prior crimes. Thus, McCoy was effectively denied his right to speak in his own defense without due process of law and the court below erred in refusing to set aside the conviction.

CONCLUSION

For all of the foregoing reasons, petitioner asks that the order entered below be reversed and:

(1) the judgment of conviction entered in the Supreme Court, New York County, be reversed and the cause remanded to that court for a new trial, or, in the alternative,

(2) the matter be remanded to the court below for a hearing on the petition at which the petitioner shall be represented by counsel to be assigned. See United States ex rel. Miller v. LaVallee, 436 F.2d 875 (2d Cir. 1970), cert. denied, 402 U.S. 914 (1971).

Dated: May 21, 1974

Respectfully submitted,

WILLIAM C. PELSTER
Attorney for Petitioner-
Appellant
30 Rockefeller Plaza
New York, New York 10020

APPENDIX

CE

CIVIL DOCKET

UNITED STATES DISTRICT COURT

JUDGE WARD

Jury demand date: 4/22/74

PRO SE

72 CIV. 4818

Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
U.S.A. EX REL, ROBERT MCCOY VS. SMITH LAVALLEE, DEP CLINTON CORRECTIONAL FACILITY, DANNEMORA, NEW YORK,	For plaintiff: ROBERT MCCOY Box B, Dannemora, N.Y. 12929 For defendant:

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
5 mailed X	Clerk				
6 mailed	Marshal				
of Action: HAB CORPUS.	Docket fee				
	Witness fees	APR 9 1974			
tion arose at:	Depositions				

SECOND CIRCUIT

A-1

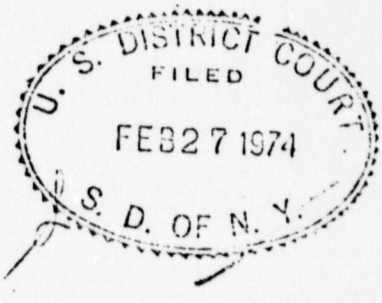
U.S.A. ex rel. [illegible] MCCOY vs. J. EDWIN LaVALLEE, etc.,

P72 CV. 48

DATE	PROCEEDINGS
Nov 13-72	Filed petition for Writ of Habeas Corpus.
Nov 14-72	Filed order permitting the pltff to proceed in forma pauperis without prepayment of fees, Gurfein, J.
Dec 11-72	Filed Notice of Assignment that the above action is assigned to Ward, J. pursuant to Rule 2(c).
Jan 8-73	Filed affidavit of Stanley L. Kantor, Dep Asst. Atty General of the State of N.Y. in opposition to petitioners application for habeas corpus relief.
on 12.73	Filed Petitioners Traverse in Rebuttal to Respondents Affidavit in opposition.
[illegible] 27-74	Filed Memorandum Order. The petition for a writ of habeas corpus is dismissed. Ward J. (mailed notice)
[illegible] 27-74	Filed Memo. End on petition. Petition dismissed in accordance with memorandum decision filed herewith. Ward J. (mailed notice)
Mar 22.74	Filed Memo. End. on motion dated 3/22/74 for Notice of Appeal. Application for certificate of pbobable cause granted. Ward J.
Mar 22.74	Filed Notice of Appeal. (mailed notice)

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By [signature]
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



UNITED STATES OF AMERICA ex rel.
ROBERT McCOY,

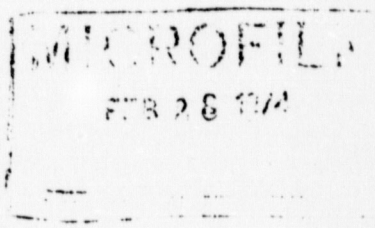
Petitioner,

-against-

J. EDWIN LaVALLEE, Superintendent,
Clinton Correctional Facility,
Dannemora, New York,

Respondent.

Pro Se 72 Civ. 4818
R.J.W.



In this in forma pauperis petition for a writ of habeas corpus petitioner Robert McCoy contests the legality of his imprisonment in the Clinton Correctional Facility at Dannemora, New York, where he is serving a sentence imposed after his 1968 conviction in New York Supreme Court for murder in the first degree and attempted murder in the first degree. He alleges that his conviction was obtained in violation of the Constitution of the United States, primarily in that evidence of an impermissibly suggestive show-up identification was admitted at trial, together with an in-court identification allegedly tainted by this out-of-court identification. He also claims that the trial

court's refusal to rule prior to trial on the admissibility of certain aspects of his past criminal record, and its refusal to permit him to take a polygraph test, violated his rights under the United States Constitution. For the reasons set forth below, this Court finds these claims to be without merit and dismisses the petition for a writ of habeas corpus.

Petitioner has exhausted his available state remedies by raising these issues in an appeal to the Appellate Division of the New York State Supreme Court and to the New York Court of Appeals, which both affirmed his conviction. He is thus properly before this Court. Brown v. Allen, 344 U.S. 443 (1953); Fay v. Noia, 372 U.S. 391 (1963).

The state court held a hearing at the time of trial, out of the presence of the jury, to determine the admissibility both of an in-court identification of the accused by one Lonnie Chambliss ("Chambliss") and of Chambliss' testimony concerning a stationhouse show-up identification.

The crime had taken place in the early morning hours of May 28, 1966. Chambliss and another man, Malachi Jackson ("Jackson"), both homosexuals, had returned to Jackson's room in a rooming house to have some drinks, accompanied by a man whom they had encountered on the street and whom Jackson had

introduced to Chambliss as "Johnny". Chambliss had never seen "Johnny" before. In Jackson's room, which was well lighted, Chambliss smoked "half a stick" of marijuana and then went to his own room in the same rooming house for several minutes. When he returned to Jackson's room, Jackson was alone. After about five minutes "Johnny" returned, with a gun, and said "This is a holdup." He forced both Chambliss and Jackson to undress, to drink whiskey and swallow two sleeping pills, then to lie down on the bed. Following this, he ordered Jackson to bind Chambliss, bound Jackson, gagged Chambliss and knocked Jackson out. Chambliss watched as "Johnny" went through their pants pockets. "Johnny" then ordered him to turn his head away, so that Chambliss was unable to observe him beat and sexually abuse Jackson, and slash the latter's throat. Chambliss' throat was also slashed and "Johnny" then left the room. Chambliss, whose wound was not fatal, was able to get up, go out to the street, and scream for help. A passerby pulled a nearby fire alarm, and a police car arrived to take Chambliss to the hospital where he was treated for lacerations and released. After questioning Chambliss, the police went to Jackson's room and found his body. Later that day Chambliss gave the police a description

of "Johnny" from which a police artist made a composite sketch.

On July 10, 1966, the police summoned Chambliss to the stationhouse, and asked him to observe petitioner through a one-way mirror. Petitioner was alone during the period Chambliss observed him, except insofar as the police directed that he change his position. Chambliss observed him for a total of ten minutes with one interruption, and then identified him as "Johnny", that is, the person with whom he had gone to Jackson's room six weeks earlier.

After hearing this testimony, the trial judge explicitly ruled that Chambliss was able to identify petitioner in court on the basis of his independent observation at the time of the crime, unaffected by the later identification procedure. He then permitted both the in-court identification and testimony concerning the show-up identification on July 10, 1966.

In a federal habeas corpus proceeding, the findings of fact of the state court are presumed to be correct, unless, upon an examination of the entire record, the federal court shall determine that those findings were not supported by the state court record. In such a case, the federal court is empowered, indeed obligated, to examine the circumstances afresh. 28 U.S.C. §2254(d); Townsend v. Sain, 372 U.S. 293

(1963). After an examination of the state court record, this Court concludes that the findings of the trial judge are supported by the record, and that, moreover, the trial judge correctly applied the law.

Under the standards evolved by the United States Supreme Court, since Stovall v. Denno, 388 U.S. 293 (1967), and set forth at length in Neil v. Biggers, 409 U.S. 188 (1972), evidence of a show-up identification is to be excluded only if, in view of the totality of the circumstances, the procedure was so unnecessarily and impermissibly suggestive as to give rise to a substantial likelihood of misidentification. 409 U.S. at 196-201. It appears that identification confrontations which occurred after the enunciation of the rule of Stovall, supra, are to be given stricter scrutiny, from the viewpoint of whether the use of a show-up rather than a line-up was necessary, than those which took place prior to that date, since the decision was not retroactive and was designed in large part to have a salutory effect on the procedures used in the stationhouse. See Neil v. Biggers, supra at 199. Furthermore, following the principles of United States v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S. 263 (1967), an in-court identification by a witness may be permitted despite an impermissible out-of-court identification procedure if the court finds it to be based upon the witness' independent recollection of the events.

In the present case, the trial judge found that Chambliss could reliably identify petitioner in court on the basis of his independent recollection of the events. The record supports the trial judge in this conclusion. Chambliss was with "Johnny" over a period of time in well lit conditions, with a substantial motivation to remember his features. Petitioner points to the facts that Chambliss had been drinking and smoking marijuana, had difficulty seeing from one eye, and failed to describe to the police artist certain noticeable features of petitioner, and from these facts attempts to persuade this Court that the finding was not supported by the record. However, this is not enough to overturn the findings of the trial judge.

The trial judge also implicitly found that the show-up procedure used was not, in the totality of the circumstances, so impermissibly suggestive as to preclude the admission of testimony concerning it at trial, for he did allow such testimony even after counsel for petitioner strenuously argued that Stovall, supra, should prevent it. This Court sustains the trial judge in this conclusion as well. While it would surely have been better for the police to use a line-up rather than a show-up, and the police advanced no reason for using the latter procedure, the identification took place before Stovall was decided. Chambliss

had given the police a description which enabled them to make a composite sketch and to pick up petitioner. Chambliss identified petitioner after viewing him carefully, and did not exhibit the degree of indecision which, as in Foster v. California, 394 U.S. 440 (1969), would reflect a substantial likelihood of misidentification caused by the suggestiveness of the procedure. See also, Neil v. Biggers, supra. Upon a consideration of the totality of the circumstances as reflected in the state court record, this Court is of the view that it was not error to allow testimony concerning the show-up identification.

Petitioner also claims that the trial judge erroneously denied a motion to suppress the use of prior convictions on cross-examination should petitioner have decided to take the stand, and that he erroneously refused to permit petitioner to take a polygraph test. These claims pertain to matters of evidence which are not of Constitutional dimension, and do not warrant granting the relief requested. See Pennington v. Stynchcombe, 428 F.2d 875 (5th Cir. 1970); United States v. Palumbo, 401 F.2d 270 (2d Cir. 1968), cert. den., 393 U.S. 1109 (1969); Sowa v. Looney, 23 N.Y.2d 320, 33-34, 296 N.Y.S.2d 760 (1968); 28 U.S.C. §2241(c)(3).

Accordingly, the petition for a writ of habeas corpus is dismissed.

It is so ordered.

Dated: February 27, 1974

Robert J. Ward
U. S. D. J.

(Witness excused.)

THE COURT: Do you want to come up a minute, gentlemen?

(Discussion at the bench, off the record, out of the hearing of the jury.)

MR. LANKLER: Detective DeVergee, please.

W I N S T O N D E V E R G E E, Shield No. 442, 24th Squad, New York City Police Department, called as a witness on behalf of the People, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LANKLER:

Q] Detective, you are presently assigned to the 24th Squad? A I am.

Q How long have you been assigned to the 24th Squad? A Four-and-a-half years.

Q How long have You been a member of the New York City Police Department? A Thirteen years.

Q Were you assigned to the 24th Squad on May 28, 1966? A I was.

Q Do you recall whether you were on duty on May 28, 1966? A I do.

A Were you? A Yes, I was.

Q Did you have anything to do with this particular case on May 28, 1966? A Yes, I did.

Q That's on May 28 you had something to do with it? A Ma- 28th --- repeat the question.

THE COURT: Do you wish to refresh your recollection from any notebook or anything?

THE WITNESS: No. I don't have any notes, your Honor.

Q May 28, the night of the homicide, that's the night of the homicide, were you on duty and do you recall having anything to do with the case at that time? A I can't recall whether I was on duty at that time or not.

Q Was Detective Albert Smith working on May 28, 1966, if you know? A I don't know.

Q All right. Did there come a time when Detective Smith went on vacation, was no longer with the squad? A Right.

Q Now, were you on duty on July 10, 1966?
A I was.

Q Was Detective Smith present on July 10, 1966?
A He was not.

Q Now. up until July 10, 199 had you had any

work to do on this case or were you assigned to this particular case? A I was not.

Q Do you recall whether on July 10, 1966, in the afternoon, Detective Keogh was working? A Detective Keogh was ~~xxxx~~ off on that date.

Q He was off on that date. A Yes.

Q Did there come a time in the afternoon of July 10, 1966 that you went someplace with relation to this case? A I did.

Q And where did you go? A 67 West 105 Street.

Q What did you do there? A I went there to locate one Robert McCoy.

Q And did you locate Robert McCoy? A I did.

Q And after locating him what did you do? A I told him to accompany me to the stationhouse.

Q And did you take him back to the stationhouse? A I did.

Q Thereafter did Detective Keogh come into the stationhouse? A He did.

Q Thereafter, to your knowledge, did Detective Keogh place the defendant, Robert McCoy, under arrest? A He did.

Q Now, Detective DeVergee, I show you a pnotograph.

MR. LANKLER: Which I ask be marked for identification.

THE COURT: 21 for identification.

(Photograph referred to marked as People's Exhibit 21 for identification.)

Q Would you look at that,please (handing to witness).

Now, Detective DeVergee, would you tell us, please, whether that fairly and accurately represents the way the defendant in this case, Robert McCoy, looked on the date of July 10, 1966. A That's a correct assumption.

Q That's the way he looked. A Right.

Q Do you see the defendant, Robert McCoy, in the courtroom at this time? A I do.

Q Would you point to him, please?

(Witness indicates.)

THE COURT: There are three men in the direction in which you are pointing at a table.

THE WITNESS: To the extreme left at tne table.

THE COURT: To the extreme left.

THE WITNRSS: Right -- to my left.

THE COURT: Indicating the defendant.

MR. LANKLER: At this time, your Honor, I would offer the photograph into evidence; and I have no other questions of this witness.

THE COURT: Show it to the other side.

MR. BRANDENBURG: No objection.

THE COURT: Without objection received as People's Exhibit 21 in evidence.

(Photograph formerly marked as People's Exhibit 21 for identification marked as Peole's Exhibit 21 in evidence.)

MR. BRANDENBURG: I have no questions.

THE COURT: You may stand down, Detective.

(witness excused.)

THE COURT: That photograph is in evidence now.

MR. LANKLER: Yes, it is, your Honor. If the jury wishes they may look at it at this time.

(People's Exhibit 21 was then circulated among the jury.)

MR. LANKLER: May we approach the bench while the jury is examining the exhibit?

THE COURT: Yes, you may.

(Discussion at the bench, off the record, out of